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ABSTRACT

This paper covers an area of tort law known as the invasion of the right of privacy, with particular emphasis upon the release of student information by colleges and universities. Following an examination of various legal cases, the law of privacy is related to public disclosure of private facts seems to require the following disclosures: private facts about the plaintiff, made public with identification of plaintiff, and which facts are offensive to a reasonable person of reasonable sensibilities. Recommended guidelines concerning the release of student information by registrars and admissions officers are examined. The recommended guidelines place more emphasis upon ethics than upon case law. However, if the administration discloses private facts about the plaintiff, makes the facts public, which clearly identify the plaintiff, and which are offensive to a reasonable sensibilities, the court would likely hold that there has been a violation of the right of privacy. (MJM)

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AN ATTORNEY VIEWS
THE RELEASE OF STUDENT INFORMATION

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This paper is intended to cover an area of tort law known as the invasion of the right of privacy, with particular emphasis upon the release of student information by colleges and universities.[1]

PART I

Definition of the Right of Privacy. The right of privacy has been given several definitions by the courts. 77 Corpus Jurus Secundum 396 says:

> The "right of privacy" has been defined as the right of an individual to be let alone, to live a life of seclusion, or to be free from unwarranted publicity.

The right of privacy also has been defined as:

(1) The right not to be subjected to unwarranted and undesirable publicity.[2]

(2) The right to live in a community without being held up to the public gaze against one's will.[3]

(3) The right to be free from the unwarranted appropriation or exploitation of one's personality.[4]

(4) The right to be free from the publicizing of one's private affairs with which the public has no legitimate concern.[5]

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[1]For annotations on the general topic of right of privacy, see 138 ALR 22, 168 ALR 446, 14 ALR 2d 750, 11 ALR 3d 1296; for a discussion of U.S. Supreme Court cases, see Alan F. Westin, Privacy and Freedom (Atheneum, 1967), pp. 349-364.

[2]Berg v. Minneapolis Star & Tribune Co. (D.C. Minn. 1948) 79 F. Supp. 957.

[3]Cason v. Baskin (1945) 155 Fla. 108, 20 So. 2d 243, 248, 168 ALR 430.

[4]Continental Optical Co. v. Reed (1949) 119 Ind. App. 643, 86 N.E. 2d 306, rehearing denied 119 Ind. App. 643, 88 N.E. 2d 55.

[5]Continental Optical Co. v. Reed, Ibid.

(5) The right to live free from any and all publicity unwarranted by the conduct or station in life of the complainant.[6]

(6) The right not to be dragged into publicity.[7]

Usually there is a distinction between libel and slander and an action for invasion of privacy. In actions of libel and slander the main theory of the cause of action is an injury to the character or reputation of the plaintiff. Truth is a defense to an action of libel or slander; but truth is not a defense to an invasion of the right of privacy. An action for an invasion of privacy seems to be a separate, personal tort of a private nature that results in injury to the feelings of the plaintiff.

History and Background Concerning the Right of Privacy. The right of privacy is a relatively new legal remedy. Legal scholars seem to agree that prior to the year 1890 there were no English or American cases which granted relief based upon the invasion of the right of privacy; however, there were some cases which seemed to have granted relief based upon invasion of some property rights, breach of confidence or breach of implied contracts.

In 1890 the Harvard Law Review published an article by Samuel E. Warren and Louis D. Brandeis.[8] The gist of this article is that the right of privacy is an independent legal right.

Subsequent to and perhaps as a consequence of this article by Warren and Brandeis, New York became the first state to acknowledge a doctrine of a right of privacy. Even though this right had been accepted in the lower courts in the State of New York, an appellate case, Roberson v. Rochester

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[6]Martin v. F.I.Y. Theatre Co., 1 Ohio Supp. 19, 21.
[7]Mau v. Rio Grande Oil, Inc. (D.C. Cal. 1939) 28 F. Supp. 845, 846.
[8]Samuel E. Warren and Louis D. Brandeis, "The Right of Privacy," (1890) 4 Harv. L. Rev. 193.

Folding Box Company, established that there was no invasion of the right of privacy when the picture of a pretty young lady was used without her consent to advertise its flour.[9] As a result of this decision, the New York Legislature enacted a statute making it both a misdemeanor and a tort to make use of the name, portrait or picture of any person for advertising purposes without the written consent of said person.

In 1905 the Supreme Court of Georgia, in Pavesich v. New England Life Ins. Co., considered the use of the plaintiff's name and picture together with a spurious testimonial by the company in their advertising.[10] The court adopted the view of Warren and Brandeis and recognized the existence of the right of privacy.

Dean Prosser's Handbook of the Law of Torts says that the law of privacy comprises four distinct kinds of invasion according to different interests of the plaintiff. These invasions are:

(1) intrusion upon the plaintiff's physical and mental solitude or seclusion;

(2) public disclosure of private facts;

(3) publicity which places the plaintiff in a false light in the public eye;

(4) appropriation, for the defendant's benefit or advantage, of the plaintiff's name or likeness.[11]

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[9]Roberson v. Rochester Folding Box Company (1902) 171 N.Y. 538, 64 N.E. 442.

[10]Pavesich v. New England Life Ins. Co. (1905) 122 Ga. 190, 50 S.E. 68.

[11]W. L. Prosser, Handbook of the Law of Torts (4 Ed., West Publishing Co., 1971); Hamberger v. Eastman (1964) 106 N.H. 107, 206 A. 2d 239, 11 ALR 3d 1288 (contains a short history of the law of torts and discusses Dean Prosser's four kinds of invasion comprising the law of privacy).

My remarks are concerned only with the second of Dean Prosser's categories, the public disclosure of embarrassing private facts about the plaintiff.

In American Jurisprudence Proof of Facts, the authors of "Privacy--Disclosure of Private Facts" have divided Prosser's second category into four elements. These are:

(a) the disclosure of private facts about the plaintiff or his affairs;

(b) the public disclosure of these private facts;

(c) the public identification of the plaintiff in these facts; and

(d) the disclosure of these private facts as offensive to persons of reasonable sensibilities.[12]

Although it is difficult to separate cases into one of these four classifications of proof, I shall try to give examples of each of the four different proof requirements of the invasion of the right of privacy.

A. Disclosure of Private Facts About the Plaintiff or His Affairs. The first item of proof is that the facts disclosed about the plaintiff must be private facts. Thus, there is no invasion of the right of privacy if the facts disclosed are already known by the public, or if the profession or occupation is in the public view. A few cases illustrating the public disclosure of private facts will give us some insight into this principle.

In 1927 in Brents v. Morgan, a notice was placed in a garage window announcing to the world the following:[13]

> Dr. W. R. Morgan owes an account here of $49.67. And if promises would pay an account this account would have been settled long ago. This account will be advertised as long as it remains unpaid.

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[12] 28 Am Jur Proof of Facts 402.

[13] Brents v. Morgan (1927) 221 Ky. 765, 299 S.W. 967.

The Court of Appeals of Kentucky found that there was an invasion of the right of privacy and that plaintiff could recover damages for mental pain, humiliation and mortification.

A leading case in the public disclosure of private facts is Melvin v. Reid.[14] The plaintiff alleged in her complaint that for a number of years she was a prostitute, was tried for murder, but later was acquitted of this murder charge; that she abandoned her life of shame and became rehabilitated; that she later married Bernard Melvin and commenced the duties of a homemaker and thereafter lived an exemplary, virtuous, honorable and righteous life. She further contended that she had assumed a respectable place in society; that her friends were not aware of her earlier life; that the defendant, without her permission or consent, made photographs and produced and released a motion picture film, "The Red Kimono"; and that this film, based upon her past professional life, was exhibited in theatres in California, Arizona and throughout other states. Naturally she alleged that this film exposed her to scorn, contempt and ridicule and grievous mental and physical suffering. She asked for damages of $50,000. The court summarized the general principles of the right of privacy:

> (1) The right of privacy was unknown to the ancient common law.
> (2) It is an incident of the person and not of the property--a tort for which a right of recovery is given in some jurisdictions.
> (3) It is a purely personal action, and does not survive, but dies with the person.
> (4) It does not exist where the person has published the matter complained of, or consented thereto.

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[14]Melvin v. Reid (1931) 112 Cal. App. 285, 297 P. 91.

> (5) It does not exist where a person has become so prominent that by his very prominence he has dedicated his life to the public, and thereby waived his right to privacy. There can be no privacy in that which is already public.
> (6) It does not exist in the dissemination of news and news events, nor in the discussion of events of the life of a person in whom the public has a rightful interest, nor where the information would be of public benefit, as in the case of a candidate for public office.
> (7) The right of privacy can only be violated by printings, writings, pictures, or other permanent publications or reproductions, and not by word of mouth. [Note: Oral communication is now generally recognized as violating rights of privacy.[15]]
> (8) The right of action accrues when publication is made for gain or profit. (This, however, is questioned in some cases.)

The court went on to say:

> We believe that the publication by respondents of the unsavory incidents in the past life of appellant after she had reformed, coupled with her true name, was not justified by any standard of morals or ethics known to us, and was a direct invasion of her inalienable right guaranteed to her by our Constitution, to pursue and obtain happiness.

In Santiesteban v. Goodyear Tire & Rubber Company, the plaintiff was employed as a waiter by the Coral Gables Country Club.[16] He had previously purchased four tires and tubes from Goodyear on the installment plan and was current on his payments. Notwithstanding these facts, Goodyear, through its authorized agent, removed without notice all tires and tubes from the plaintiff's automobile while it was in the country club parking lot. The automobile was left in full view of his fellow employees and country club members. He alleged that he suffered embarrassment,

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[15] Bowden v. Spiegel, Inc. (1950) 96 Cal. App. 2d 793, 216 P. 2d 571; Carr v. Watkins (1962) 227 Md. 578, 177 A. 2d 841. See annotation "Invasion of Right of Privacy by Merely Oral Declarations," 19 ALR 3d 1318 (oral communication now generally recognized as violating rights of privacy).

[16] Santiesteban v. Goodyear Tire & Rubber Company (5 Cir. 1962) 306 F. 2d 9.

humiliation, wounded feelings, became the butt of jokes from his fellow employees and was caused to suffer two sleepless nights. The court held that the action of Goodyear was a "demonstrative publication" and that the plaintiff did have a cause of action for a breach of his right of privacy.

In Banks v. King Features Syndicate, the plaintiff filed a lawsuit against the defendant, King Features Syndicate, for disclosure of X-rays of her pelvic region.[17] The facts revealed the following sequence of events. The physicians took an X-ray picture of her pelvic region which disclosed a six-inch steel hemostat in her abdomen. The plaintiff had had this steel clamp in her for four years as a result of a prior operation. Doctors released this picture without her consent to a Tulsa newspaper reporter. This reporter in turn, for a monetary consideration, passed the X-ray picture along to King Features Syndicate, Inc., the defendant. King Features then wrote an article and sold its story and her X-ray picture to the New York Evening Journal, and this article was circulated throughout every state in the United States and the District of Columbia. The Federal District Court for the Southern District of New York held that there was an invasion of the right of privacy.

These examples show that there must be exposure of private facts about the plaintiff in order to create liability under the right of privacy. Other examples of facts which are deemed to be private are those related to owing

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[17]Banks v. King Features Syndicate, Inc. (D.C. N.Y. 1939) 30 F. Supp. 352.

debts to another,[18] medical pictures of plaintiff's anatomy,[19] and eccentric and unusual personal characteristics.[20]

The courts have also held that photographs taken of a plaintiff in his home without permission is a violation of the right of privacy. In Dietemann v. Time, Inc., Life magazine, in its November 1, 1963 edition, carried an article, "Crackdown on Quackery."[21] Life magazine had entered into an arrangement with the district attorney's office of Los Angeles County whereby the magazine's employees would visit the plaintiff to obtain facts and pictures concerning his activities. The article depicted the plaintiff as a quack and included two pictures of him. The pictures were taken by the defendant's agent with a hidden camera in the plaintiff's house without his consent. The court said:

> If a person's home, or even his business premises, is to be subjected to invasion by subtrafuge for the purpose of obtaining facts concerning his private life, then privacy would not exist. It may well be that a professional man violating the law in connection with the practice of his profession should be arrested, prosecuted, and his activities suppressed, but it is inconceivable that the press or even a law enforcement officer can be permitted to obtain entrance by subtrafuge for the purpose of photographing or observing these activities.

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[18] Trammell v. Citizens News Co., Inc. (1941) 285 Ky. 529, 148 S.W. 2d 708 (where a newspaper published a notice that plaintiff owed an account at a grocery store).

[19] Banks v. King Features Syndicate, op. cit.; Griffin v. Medical Society of State of New York (1939) 7 Misc. 549, 11 N.Y.S. 2d 109 (deformed nose); Feeney v. Young (1920) 191 App. Div. 501, 181 N.Y.S. 481 (public exhibition of film of cesarean operation); Lambert v. Dow Chemical Company (La. App. 1968) 215 So. 2d 673 (photographs of a man's badly injured thigh).

[20] Cason v. Baskin, op. cit. (where a publication of a book which clearly identifies a plaintiff who operated a backwoods orange grove, using the language in the book: "I cannot decide whether she should have been a man or a mother," and other coarse speech and brusque manners was held to be a violation of the right of privacy).

[21] Dietemann v. Time, Inc. (D.C. Cal. 1968) 284 F. Supp. 925.

The court held that the plaintiff was entitled to damages for injury to his feelings and peace of mind and that his right of privacy had been violated.

While photographs of a plaintiff taken in a private place may be a violation of the right of privacy,[22] photographs taken in a public place may not be an invasion.[23]

One interesting case held that a photograph taken in a public place was an invasion of the right of privacy. The plaintiff visited a "fun house" at a county fair and a photograph was taken of her with her dress blown up as she passed over a floor air blower. The court held that the photograph was an invasion of plaintiff's right of privacy.[24]

Facts concerning the disclosure of date of birth or marriage,[25] military service,[26] public occupation,[27] and public records[28] are generally considered public rather than private; thus disclosure of such facts does not violate the right of privacy.

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[22]Dietemann v. Time, Inc., Ibid.

[23]Gill v. Hurst Publishing Co. (1953) 40 Cal. 2d 224, 253 P. 2d 441 (photograph of husband and wife embracing in a public place).

[24]Daily Times Democrat v. Graham (1964) 276 Ala. 380, 162 So. 2d 474.

[25]Meetze v. Associated Press (1956) 230 S.C. 330, 95 S.E. 2d 606 (birth of a son to a 12-year-old mother); Werner v. Times-Mirror Co. (1961) 193 Cal. App. 2d 111, 14 Cal. Rptr. 208 (marriage records).

[26]Stryker v. Republic Pictures Corp. (1951) 108 Cal. App. 2d 191, 238 P. 2d 670; Continental Optical Co. v. Reed, op. cit. (military service records).

[27]Continental Optical Co., Ibid.; Reed v. Orleans Parish Schoolboard (La. App. 1945) 21 So. 2d 895 (a school teacher's compulsory war work and other outside activities).

[28]Langford v. Vanderbilt University (1956) 199 Tenn. 389, 287 S.W. 2d 32 (filed pleading in lawsuit).

Where public records are not open to public inspection, the disclosure of them may invade the right of privacy. Examples of this are the disclosure of records of a narcotic addict's treatment[29] and the disclosure of income tax returns.[30]

B. Public Nature of Disclosure. In addition to the disclosure of private facts, there must be a public disclosure of these facts in order to violate the right of privacy. In Saniesteban v. Goodyear Tire & Rubber Co., the court said:[31]

> It is pointed out in Prosser on Torts 2d Ed § 97 that except in cases of physical intrusion the tort must be accompanied by publicity in the sense of communication to the public in general or to a large number of persons as distinguished from one individual or a few.

In another case, Hawley v. Professional Credit Bureau, Inc., the court held that a collection agency could write a letter to the plaintiff's employer for the purpose of soliciting the cooperation of the employer in collecting the debt and that such letter writing did not constitute an invasion of the right of privacy of the plaintiff. Yet, in Brents v. Morgan, a case previously discussed, the court stated that liability existed when a physician's debts were publically displayed in a store window.[33]

In another case no invasion of the right of privacy existed when the plaintiff was accused of theft by another individual or a small group.[34]

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[29]Patterson v. Tribune Co. (Fla. App. 1962) 146 So. 2d 623, cert den (Fla.) 153 So. 2d 306.
[30]Maysville Transit Co. v. Ort (1944) 296 Ky. 524, 177 S.W. 2d 369.
[31]Santiesteban v. Goodyear Tire & Rubber Co., op. cit.
[32]Hawley v. Professional Credit Bureau, Inc. (1956) 345 Mich. 500, 76 N.W. 2d 835.
[33]Brents v. Morgan, op. cit.
[34]Gregory v. Bryan-Hunt Co. (1943) 295 Ky. 345, 174 S.W. 2d 510; French v. Safeway Stores, Inc. (1967) 247 Or. 554, 430 P. 2d 1021; Schwartz v. Thiele (1966) 242 Cal. App. 2d 799, 51 Cal. Rptr. 767.

However, distribution of a letter to 1,000 people containing private facts was considered an invasion of the right of privacy.[35]

C. Identification of the Injured Party. In addition to the disclosure of private facts and the public nature of that disclosure, the injured party must show some identification with the facts disclosed in order to have a right of recovery. In the case of Bernstein v. National Broadcasting Co., the plaintiff was convicted of bank robbery in Minnesota and sentenced to imprisonment for forty years.[36] After serving nine years, he was paroled and pardoned. In 1933, under a different name, he was tried and convicted of first degree murder and sentenced to death by electrocution. Later his death sentence was commuted to life imprisonment. In 1940, after serving five years in various federal prisons, he received a conditional release from his life sentence followed by a presidential pardon in 1945. The plaintiff contended that the publicity in newspapers and magazines from the time of his trial in 1932 until his release in 1940 was excessive and abusive. In 1936 or 1937 Detective Story magazine carried an article regarding the plaintiff's case, and in 1948 a radio program told the plaintiff's story in a fictionalized version. In 1952 NBC telecast a program, "The Big Story," relating some of the life of the plaintiff. The plaintiff's true name was never used in the telecast. He alleged that the telecast of

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[35]Kerby v. Hal Roach Studios (1942) 53 Cal. App. 2d 207, 127 P. 2d 577.
[36]Bernstein v. National Broadcasting Co. (D.C. Dist. Col. 1955) 129 F. Supp. 817, affd 98 App. D.C. 112, 232 F. 2d 369, cert den 352 US 945, 1 L. Ed. 2d 239, 77 S. Ct. 267.

this program constituted "a wilful and malicious invasion of...[his] right of privacy...." The court held that televising the story twelve years after the plaintiff had been pardoned, combined with a careful and honest attempt to conceal his identity, did not constitute an invasion of his right of privacy.

On the other hand, in Cason v. Baskin, the court said there was an invasion of the right of privacy if an author disclosed in a book the plaintiff's first name and made her recognizable to her acquaintances and commented upon her coarse speech and brusque manner.[37]

D. Reasonable Man Test. The final qualification is that the facts which are made public must be offensive or objectionable to a reasonable man of ordinary sensibilities. Davis v. General Finance & Thrift Corporation involved an action for violation of the right of privacy initiated when the defendant sent to the plaintiff a telegram which said, "Must have March payment immediately or legal action." The court said "...the right of privacy must be restricted to 'ordinary sensibilities' and not to super-sensitiveness...." The court went on to say, "There are some shocks, inconveniences and annoyances which members of society in the nature of things must absorb without the right of redress."[38]

Another pertinent case, Samuel v. Curtis Publishing Co., involved an issue where the defendant published a picture of the plaintiff in The Saturday Evening Post.[39] In this picture the plaintiff was standing on the San Francisco Golden Gate Bridge persuading a woman, who was over the

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[37]Cason v. Baskin, op. cit.
[38]Davis v. General Finance & Thrift Corporation (1950) 80 Ga. App. 708, 57 S.E. 2d 225.
[39]Samuel v. Curtis Publishing Co. (N.D. Cal. 1954) 122 F. Supp. 327.

side of the bridge, to refrain from jumping. The caption under the picture named the plaintiff and the woman. The picture first appeared in the San Francisco Call-Bulletin on April 22, 1952. The court said:

> An invasion of the right of privacy occurs not with the mere publication of a photograph, but occurs when a photograph is published where the publisher should have known that its publication would offend the sensibilities of a normal person, and whether there has been such an offensive invasion of privacy is to some extent a question of law.

The court held that there was nothing in the picture to offend the sensibilities of a normal person and thus no liability.

We have already seen that public display of X-rays of a woman's pelvic region constituted a disclosure of private facts,[40] and that the disclosure of embarrassing, eccentric personal traits also violated the right of privacy.[41] In both of these cases, the courts also appeared to apply the reasonable man test.

Consent. If a plaintiff consents either expressly or impliedly to the disclosure of private facts, there is no liability.[42] Of course consent has historically been a defense to a tort and has not been limited to the right of privacy.[43]

Barber v. Time, Inc., held that the defendant's belief that it had the plaintiff's consent did not constitute a defense to the action although it may mitigate any punitive damages.[44] In this case, Time magazine published an article, including a photograph, about plaintiff's physical ailment while she was being treated in a hospital. Time employees first

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[40]Banks v. King Features Syndicate, Inc., op. cit.
[41]Cason v. Baskin, op. cit.
[42]Prosser, op. cit., p. 817.
[43]Continental Optical Co. v. Reed, op. cit.; Porter v. American Tobacco Co. (1910) 140 App. Div. 871, 125 N.Y.S. 710.
[44]Barber v. Time, Inc. (1942) 348 Mo. 1199, 159 S.W. 2d 291.

saw the article about plaintiff's ailment, with her picture, in a prior publication. The magazine had been furnished this information by a news service. Time assumed that the consent of the plaintiff had been given because of prior publication. The court held that Time could not escape liability because of the assumed consent.

Finally, it is important to recognize that gratuitous consent may be revoked at any time[45] although consent obtained by a contractual monetary consideration usually is irrevocable.[46]

Summary. My examination shows that the law of privacy as related to public disclosure of private facts seems to require the following disclosures:

(a) private facts about the plaintiff;

(b) made public;

(c) with identification of plaintiff; and

(d) which facts are offensive to a person of reasonable sensibilities.

PART II

Release of Student Information by Registrars and Admissions Officers. I have found no reported case law upon the subject of the release of student records by college registrars or admissions officers. There appears to be more public interest in this subject as evidenced by Gordon G. Greer's article in a recent magazine entitled "What You Should Know About Students'

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[45]Garden v. Parfumerie Rigaud, Inc. (1933) 151 Misc. 692, 271 N.Y.S. 187.
[46]Lillie v. Warner Bros. Pictures, Inc. (1934) 139 Cal. App. 724, 34 P. 2d 835.

Rights."[47] This article has a sub-topic: "Does Invasion of Privacy Apply to School Records?" It indicates, without citing any legal authority, that there is no liability when these records contain educational data such as attendance records, test grades and achievement levels. It states, without citing sources, that more schools are including information about the student's health, his family background, religion, ethnic origins, patriotism, parent's income, delinquency reports and psychological and psychiatric evaluations. Mr. Greer says that a disclosure of these facts would be a violation of the right of privacy.

Lawrence R. Caruso, an attorney, discusses the right of privacy and confidentiality of the release of student record information in the 1970 Summer issue of College and University.[48] He reports that records which may be made available to the public include facts that the student attended the university, the dates of attendance, the degrees received, and the dates the degrees were conferred. He has some reservation about releasing information concerning disciplinary actions and other related items.

Another publication of AACRAO, A Guide to the Release of Information About Students, indicates that each institution of higher education should have a policy regarding the release of student information.[49] This document contains specific guidelines for disclosure of information to the student himself, to the faculty and administrative officers, to parents, to educational institutions and agencies, to government agencies, and to other

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[47] Gordon G. Greer, "What You Should Know About Students' Rights," Better Homes and Gardens (February, 1972) p. 68 and 118.

[48] Caruso, Lawrence R., "Privacy and Confidentiality of Student Records--A Legal View," College and University, 45 (Summer, 1970) pp. 645-653.

[49] A Guide to the Release of Information About Students, American Association of Collegiate Registrars and Admissions Officers (Washington, October, 1969).

individuals and organizations, to telephone inquiries, to student directories, and to other offices of the institution. These guidelines seem to be based upon rather sound and conservative policies; however, they do not take into account specific principles of the case law which I have heretofore discussed. I cannot fault the authors for failing to cite legal authority since case law is sparse.

Another article upon our topic by the Council of Student Personnel Association of Higher Education contains seventeen guidelines for the release of student information.[50] Some of these guidelines follow:

(a) The information retained must have a reasonable "relevance to the educational and related purposes of the institution."

(b) A student's "academic, medical, counseling and disciplinary records... should be kept separately and not disseminated" without his consent "except under legal compulsion."

(c) Although certain records must be retained permanently, a time limit should be specified for retaining others.

(d) "Duplication of records should be kept at a minimum."

(e) "A student should have the right to inspect his academic record."

(f) "[S]taff members who have a legitimate interest and need should be allowed information concerning the record of any student."

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[50] Report of the Commission on Student Records and Information, Council of Student Personnel Association in Higher Education (August, 1970). Also see Guidelines for the Collection, Maintenance and Dissemination of Public Records, A Report of a Conference on Ethical and Legal Aspects of School Record Keeping, Russell Sage Foundation (May, 1969). These guidelines are more restrictive than legal requirements appear to warrant. Another general article containing guidelines is Paul L. Dressel, "Student Records: Uses and Abuses," College and University, 47 (Fall, 1971) pp. 48-62.

(g) "Disciplinary records are for internal use" and should not be made public.

(h) "Financial records..., including those related to granting of scholarships," should be confidential.

(i) "Policies should recognize the responsibility of institutions to be responsive to bonafide inquiries when national security or the safety of individuals or property is at issue."

After reviewing several reports on recommendations concerning the release of student information, your own AACRAO guidelines appear sound and even exceed my interpretation of the present legal requirements.

An interesting, recent case involved the Regents of the University of California and revolved around the following facts.[51] The University Board of Trustees had adopted certain rules for the registration of student organizations which entitled such organizations certain campus privileges including the use of the university facilities, fund raising permission, the recruiting of members, the posting and distributing of literature and the privilege of inviting non-university speakers to address certain campus meetings. Registration requirements of the University required organizations to submit a statement of their purposes together with the names of their officers. The organization to which the plaintiff, Eisen, belonged submitted the plaintiff's name under this university registration requirement.

In October, 1966, a member of the general public filed a suit against the administrative officers of the Berkley campus requesting the disclosure of the names of the officers and stated purposes of all student campus organizations which were registered. The University then adopted a policy

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[51] Eisen v. Regents of University of California (1969) 269 Cal. App. 2d 696, 75 Cal. Rptr. 45, 37 ALR 3d 1300.

stating "that registration statements filed with the University by student organizations are records open to inspection by university students and staff members and members of the public." Eisen, a law student and an officer of a student organization engaged in the advocacy of dissident ideas, filed a suit alleging that his rights of free speech and association under the First and Fourteenth Amendments to the U. S. Constitution were being violated by the university's policy of opening to the public the registration statement filed by his student organization. The case was dismissed by the trial court upon the sustaining of a demurrer. The California Court of Appeals, First District, Division 2, affirmed the decision of the trial court. The court said:

> The question here presented is whether the right of the People of this state to know the identity and responsible officers of student organizations that may be using the publicly financed and owned campus facilities of the university is a sufficient state interest to warrant the indirect infringement of plaintiff's First Amendment rights.

The court went on to say that the people of the state have a right to know how their elected officials conduct public business. They also are entitled to know the identity of the officers and organizations who have the privileges of using the campus, as the campus is public property. The court further said that impairments of First Amendment rights are balanced. This equilibrium is determined by the relationship between the impairment and the overriding and compelling state interests to make public disclosure. The court further found that the rule of the University in requiring the registration of student organizations was consistent with the university policy of insuring the orderly enjoyment of its facilities,

together with the public's right to ascertain the identity of organizations and the responsible officers who were using public property.

Although the court did not discuss the four principles of disclosure in the right of privacy as we have heretofore discussed, the court seemed to say that the disclosed registration facts were public rather than private; therefore, there was no breach of the right of privacy.

All courts agree that public universities and colleges may make all necessary and proper rules and regulations for the orderly management of their educational institutions and the preservation of discipline.[52] Likewise, private colleges or universities have the right to adopt suitable rules and regulations for government and management of their institutions.[53] The court will not interfere with reasonable rules and regulations in the absence of a clear showing that the authorities have acted arbitrarily or have abused the authority vested in them.[54] Since colleges and universities do have this freedom to make reasonable rules and regulations, it is my suggestion that registrars and admissions officers follow the guidelines of AACRAO for the release of information about student records. This policy should be adopted by the board of trustees or other governing body of an institution.

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[52]Waugh v. University of Mississippi (1915) 237 US 589, 59 L. Ed. 1131, 35 S. Ct. 720; Pyeatte v. Board of Regents (D.C. Okla. 1951) 102 F. Supp. 407, affd without op 342 US 936, 96 L. Ed. 696, 72 S. Ct. 567; State ex rel. Little v. University of Kansas (1895) 55 Kan. 389, 40 P. 656; Woods v. Simpson (1924) 146 Md. 547, 126 A. 882, 39 ALR 1016; McGinnis v. Walker (1941) 35 Ohio, L. Abs. 245, 40 N.E. 2d 488; Foley v. Benedict (1932) 122 Tex. 193, 55 S.W. 2d 805, 86 ALR 477.

[53]Anthony v. Syracuse University (1927) 130 Misc. 249, 223 N.Y.S. 796, revd on other grounds 224 App. Div. 487, 231 N.Y.S. 435; Koblitz v. Western Reserve University, 21 Ohio C.C. 144, 11 Ohio C.D. 515.

[54]Gott v. Berea College (1913) 156 Ky. 376, 161 S.W. 204; Connell v. Gray (1912) 33 Okla. 591, 127 P. 417.

In the past few years, there have been many changes in the law regarding colleges and universities and the activities of college and high school students. The law in this area is changing and has been changing at a rapid rate. It is difficult to predict development of the law in this particular area as there could be so many different and difficult factual situations to resolve. In any event, there would seem to be little risk in releasing statistical information such as attendance dates, degrees earned, and majors or minors. Releasing additional detailed information such as grades, disciplinary actions, private counseling data in dean of students offices, and some medical data in student health offices will involve more risk. Of course this risk may always be eliminated by obtaining a specific consent from the student.

The only advise which I can give you must be based upon the cases which I have found and have here reported. A hypothetical example may illustrate our discussions. For example, if an FBI agent obtains information from your office without student consent, your attorney could argue that the facts were not private ones, that even if they were private they were not made to the general public and were not offensive to a person of reasonable sensibilities.

I am assuming that most of the registrars and admissions officers attending this meeting are persons of reasonable sensibilities. If the information you are releasing would somewhat offend your sensibilities, then this alone should warn you to be cautious about what information you release.

Finally, I can say that legal research in the area of privacy is both time consuming and difficult. Most lawyers go into court on the basis of

some reported case or some statute. The burden is upon the plaintiff to prove his case by a preponderance of the evidence. Judges will require briefs from the plaintiff to show that his rights of privacy have been violated. Since there are few reported cases involving specific colleges and universities, most arguments in this area will have to be argued by way of analogy.

Conclusion. We have observed that the law concerning the right of privacy is relatively new. We noted that there are no specific cases which involve actions against college registrars and admissions officers. We examined some recommended guidelines regarding the release of student information and observed that these recommendations place more emphasis upon ethics than upon case law. Finally, we presented four legal principles of case law regarding the disclosure of private facts about an individual.

If in the administration of your duties you disclose (1) private facts about the plaintiff, (2) which are made public, (3) which clearly identify the plaintiff, and (4) which are offensive to a reasonable man or a person of reasonable sensibilities, then a court would likely hold that there has been a violation of the right of privacy.